THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

December 31, 1986

Overruled By:
ORD-468 IN PART

Mr. Edward H. Perry
Assistant City Attorney
Office of the City Attorney
City Hall
Dallas, Texas 75201

Open Records Decision No. 454

Re: Whether an investigative report prepared by a police department regarding a fatal shooting is available to the family of the victim after it has been selectively disclosed to the police officer who shot the victim

Dear Mr. Perry:

On August 18, 1984, a city of Dallas police officer fatally shot a young man. An attorney representing the family of the deceased has asked the city to release its investigative report of this incident. You have asked whether sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(8) or 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S., except this report, labelled "Exhibit B," from required disclosure.

We conclude that section 3(a)(3) embraces this report. This section allows governmental bodies to withhold information relating to reasonably anticipated litigation. See, e.g., Open Records Decision No. 416 (1984). In your request letter, you state that

> [s]ince the family of the person shot has obtained legal counsel to investigate the matter, there is a strong possibility that the city of Dallas may be involved in a claim arising from the shooting incident, especially in light of the fact that the request is for certified copies and the requestor has referenced his subject matter as 'Juan Reyes vs. the City of Dallas.' (Emphasis in original).

In a subsequent letter, moreover, you state that the federal government is investigating this incident to determine whether a civil rights violation occurred. These factors convince us that litigation is reasonably anticipated here.

This does not end our inquiry, however. In your request letter you state that

> [m]ost of the information, though not all, in Exhibit B was released to the officer and his attorney because of due process considerations . . . so that the officer could adequately address the charges against him.

Section 14(a) of the Open Records Act provides that

> [t]his Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

Previous decisions, moreover, indicate that once they have selectively disclosed information relating to litigation, governmental bodies may be precluded from invoking section 3(a)(3) to withhold that information from others. See, e.g., Open Records Decision Nos. 349, 320 (1982) (section 3(a)(3) may not be claimed when all parties to litigation have inspected records pursuant to court order or discovery). We must decide whether, having released most of Exhibit B to the police officer, the city of Dallas is now barred from withholding it from this requestor.

The crucial distinction between this situation and the ones with which Open Records Decision Nos. 349 and 320 dealt is that in those decisions, all parties to the litigation to which the information in question related had already seen that information. The question, therefore, was whether a governmental body may invoke section 3(a)(3) to withhold from the general public information which has been seen by all parties to litigation in which it is involved. Here, by contrast, the city of Dallas gave Exhibit B to a police officer who will likely be a co-defendant if a lawsuit arising out of this incident is filed, but it has not shown this exhibit to the prospective plaintiff in that litigation. The city released this exhibit, moreover, only because it concluded that the due process clause of the Fourteenth Amendment to the United States Constitution entitled the police officer to obtain the exhibit to prepare for his administrative pretermination hearing. The question in this instance, therefore, is whether a governmental body which has disclosed information to a co-defendant in anticipated litigation may withhold that information from the prospective plaintiff. We conclude that where, as here, the governmental body disclosed such information because it reasonably concluded that it had a constitutional obligation to do so, it may invoke section 3(a)(3) to withhold that information from the prospective plaintiff.

In effect, Open Records Decision Nos. 349 and 320 concluded that once all parties to litigation involving a governmental entity have seen particular information relating thereto, the entity no longer has

any legitimate section 3(a)(3) interest in withholding that information from anyone else. Even if we accept this proposition, it does not follow that an entity which has disclosed information to one party to the litigation can have no legitimate section 3(a)(3) interest in withholding it from another party. On the contrary, one interest which clearly would exist is the "discovery" interest discussed in Open Records Decision Nos. 349 (1982) and 288 (1981). There, this office observed that a primary purpose of section 3(a)(3) is to enable governmental entities to protect their position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery, if at all. Where, as here, an entity has disclosed information to a prospective co-defendant, it may still have legitimate reasons for wanting to compel the prospective plaintiff to resort to discovery to obtain that information. And if the entity's decision to disclose the information to the prospective co-defendant was not voluntarily taken, it cannot be claimed that section 14(a) of the act applies and that the entity has voluntarily waived its right to assert its section 3(a)(3) interests.

The remaining question is whether the city of Dallas involuntarily released Exhibit B to the police officer. We answer in the affirmative. You have given us a copy of an opinion of the city attorney of Dallas which discusses the due process rights of city employees, and you have informed us that this memorandum prompted the city to conclude that the police officer had a constitutional right to see Exhibit B to prepare for his administrative pretermination hearing. Based on this memorandum, we believe that the city's conclusion was entirely reasonable. We understand, moreover, that the city would not have given this report to the police officer if it had not concluded that it had a constitutional obligation to do so. In our opinion, if an entity releases information because it reasonably concludes that the due process clause requires it to do so, the decision to release the information is not voluntary, but one compelled by law. We do not believe that section 3(a)(3) should be construed so that an involuntary decision to provide a prospective co-defendant with information relating to anticipated litigation will absolutely bar a governmental entity from invoking that section to withhold that information from the prospective plaintiff. To reach such a conclusion would force the entity to make a Hobson's choice: if it releases the information it relinquishes, through no fault of its own, its right to assert legitimate section 3(a)(3) interests, and if it withholds the information it violates the Constitution. This situation could not have been contemplated by the legislature which enacted section 3(a)(3).

In summary, we conclude that a governmental entity which, because of its good-faith conclusion that it has a constitutional obligation to do so, provides an individual who will be a co-defendant in anticipated litigation with information relating to that litigation,

is not precluded from invoking section 3(a)(3) to withhold that information from the prospective plaintiff in that litigation. When there is any doubt as to whether the decision to withhold information is the result of such a good-faith conclusion, this office may require supporting evidence. In reaching our conclusions, we imply nothing with respect to whether a governmental entity which voluntarily provides a prospective co-defendant with such information is precluded from invoking section 3(a)(3) to withhold that information from the prospective plaintiff.

Very truly yours,

Jim Mattox

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